The Limits of Judicial Discretion: Emotive Dispositions of Israeli Courts in Implementing the New York Convention

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ABSTRACT

Impelled by the massive growth of cross-border trade and the need to avoid costly and unpredictable judicial proceedings in the resolution of international business disputes, the business community has evinced a growing preference for arbitration as a method for resolving international business disputes. The nearly universally ratified New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides a uniform regime for the enforcement of international arbitration agreements and awards by national courts. By seeking to provide for uniform conduct by national courts in the enforcement of international arbitration agreements, the Convention directs national courts seized of an action governed by an arbitration agreement to refer parties to arbitration, except under limited specified circumstances.

There is a common perception that the New York Convention's regime of mandatory referral of disputes to arbitration has been widely recognized by courts of signatory states as a uniform rule. This article challenges this perception by focusing on a salient example of a country that falls short of the expected normative practice. By meticulously analyzing the Israeli courts' varied approaches towards mandatory referral of agreements governed by the New York Convention, the Article concludes that these courts' "emotive disposition" creates a gap between the intent of the Convention to standardize judicial behavior and its implementation by national courts.

This article stresses the role of national courts in implementing the Convention uniformly and in supporting its regime and advises the Israeli courts to follow treaty objectives to promote international arbitration in order to provide predictability in the resolution of disputes to the international business community.

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I. INTRODUCTION

Impelled by the expansion of the global economy and the massive growth of cross-border trade in the past two decades, the international business community has evinced a growing preference for arbitration as a method for the resolution of international commercial disputes.[1] The inclination of international business actors to avoid costly and sometimes unpredictable judicial proceedings before national courts is a crucial factor in negotiating international commercial transactions. Carefully drafted arbitration clauses are an essential—and common—element of international business contracts.

Arbitration agreements aim to provide contracting parties with confidence that disputes that may arise in connection with their contract will be settled by a neutral arbitrator in accordance with the method they have agreed upon in advance, and not in a foreign judicial forum. Yet this confidence would dissipate in the absence of enforcement of these agreements by national courts. Notwithstanding their original intentions, parties may, and sometimes do, breach agreements to arbitrate by bringing their disputes before the courts. At that point, the crucial issue becomes whether courts will honor the parties' original intentions to arbitrate their dispute, i.e., whether the courts will enforce the arbitration agreement, or if they will proceed to resolve disputes in their own right. Courts are naturally disinclined to renounce their jurisdiction and their inherent right to resolve disputes.[2] Support by policymakers is, therefore, required to reassure the international business community that arbitration agreements will be upheld and enforced by national courts.

Such support is evidenced by the ratification by more than 140 countries

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[1] *See, e.g.*, YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE; INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 6 (1996); Klaus P. Berger, *Party Autonomy in International Economic Arbitration: A Reappraisal*, 4 AM. REV. INT'L ARB. 1, 7 (1993); W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 TEX. INT'L L.J. 1 (1995); Christopher R. Drahozal, *Section II: Civil Law, Procedure, and Private International Law: New Experiences of International Arbitration in the United States*, 54 AM. J. COMP. L. 233 (2006); Loukas Mistelis, *International Arbitration—Corporate Attitudes and Practices — 12 Perceptions Tested: Myths, Data and Analysis Research Report*, 15 AM. REV. INT'L ARB. 525 (2004); Amber A. Ward, Comment, *Circumventing the Supremacy Clause? Understanding the Constitutional Implications of the United States' Treatment of Treaty Obligations Through an Analysis of the New York Convention*, 7 SAN DIEGO INT'L L.J. 491, 493 (2006).

[2] *See infra* note 14 and accompanying text.

of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[3] The Convention provides a uniform legal regime for the enforcement of international arbitration agreements and awards, and has been the greatest contributing factor to the development of international commercial arbitration over the past fifty years.[4] The United States ratified the Convention in 1970, thus recognizing the importance of international commercial arbitration to transnational business.[5]

Uniform implementation of international conventions is a key factor to their success. The international legal regime that an international convention purports to establish can be best maintained if courts apply the "treaty application doctrine", in which courts read treaty provisions according to their plain language and context. Under this doctrine, alternative domestic principles of law and the exercise of discretion by national courts ought to have no place in the implementation of international conventions, as the benefits of these conventions would be undermined if the courts were to inject their domestic views into the treaty regime.

By seeking to provide for uniform conduct by national courts in the enforcement of international arbitration agreements, Article II(3) ("the Article") of the New York Convention provides that a national court seized of an action governed by an arbitration agreement shall "at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."[6]

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[3] Convention on the Recognition and Enforcement of Foreign Arbitral Awards [hereinafter New York Convention or the Convention], June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38. A list of the members is available at the U.N. Commission on International Trade Law's website, Status: 1958 — Convention on the Recognition and Enforcement of Foreign Arbitral Awards, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited April 1, 2009).

[4] *See, e.g.*, CHRISTIAN BÜHRING-UHLE, ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS 78 (1996); Craig, supra note 1, at 11. William W. Park & Alexander A. Yanos, *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration*, 58 HASTINGS L.J. 251, 257 (2006). For a discussion of the history, background, and purposes of the Convention, *see* ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958, TOWARDS A UNIFORM JUDICIAL INTERPRETATION at 6–8 (1981); HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 8 (1989); Jill A. Pietrowski, *Enforcing International Commercial Arbitration Agreements Post-Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 36 AM. U. L. REV. 57, 63–64, nn.33–36 (1986).

[5] Act of July 31, 1970, Pub. L. No. 91-368, 84 Stat. 692 (1970) (codified at 9 U.S.C. §§ 201-208 (2000)).

[6] *See* Article II(3) of the Convention.

By its own explicit terms, the Article leaves no room for the exercise of discretion by a national court. Once the conditions of the Article are fulfilled, the Article mandates that the courts recognize arbitration agreements and refer the parties to arbitration unless any of the exceptions stipulated in the Article applies.[7] The Article's clear language is intended to provide predictability of jurisdiction and uniformity of law so that that the outcome of an application to enforce an arbitration agreement would be similar in all the signatory states.

The need to promote international arbitration by providing certainty and reassurance to international trading actors has been a major factor towards positive judicial attitude for international arbitration agreements.[8] United States courts, for instance, have routinely relied on this rationale to refrain from exercising discretion in enforcing arbitration agreements and to follow the strict and unambiguous language of the Convention.[9]

There is a common perception that the New York Convention's regime of mandatory referral of disputes to arbitration has been widely recognized by courts of contracting states as a uniform rule.[10] According to this view,

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[7] *See* Articles II(1) and II(2) of the Convention.

[8] *See, e.g.*, Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974); Termorio S.A. E.S.P. v. Electranta S.P., 487 F.3d 928, 933 (D.C. Cir. 2007); Bautista v. Star Cruises, 396 F.3d 1289 (11th Cir. 2005); Meadows Indem. Co. Ltd. v. Baccala & Shoop Ins. Services, Inc., 760 F. Supp. 1036 (E.D.N.Y. 1991); David L. Threlkeld & Co. v. Metallgesellschaft Ltd., 923 F.2d 245, 248 (2d Cir. 1991); Susan L. Karamanian, *The Road to the Tribunal and Beyond: International Commercial Arbitration and United States Courts*, 34 GEO. WASH. INT'L L. REV. 17 (2002).

[9] *See, e.g.*, Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985); Lim v. Offshore Specialty Fabricators, Inc., 404 F.3d 898, 903 (5th Cir. 2005); Fred Freudensprung v. Offshore Tech. Serv., 379 F.3d 327 (5th Cir. 2004); Intergen N.V. v. Grina, 344 F.3d 134, 141 (1st Cir. 2003); DiMercurio v. Sphere Drake Ins., PLC, 202 F.3d 71, 74 (1st Cir. 2000); McMahan Sec. Co. v. Forum Capital Markets, 35 F.3d 82, 85–86 (2d Cir. 1994); Progressive Cas. Ins. v. C.A. Reaseguradora Nacional de Venezuela, 991 F.2d 42, 45 (2d Cir. 1993); Nicaragua v. Standard Fruit, 937 F.2d 469, 475 (9th Cir. 1991); Ledee v. Ceramiche Ragno, 684 F.2d 184, 187 (1st Cir. 1982); I.T.A.D. Assoc. v. Podar Bros., 636 F.2d 75, 77 (4th Cir. 1981); McCreary Tire & Rubber Co. v. CEAT S.p.A., 501 F.2d 1032, 1037 (3d Cir. 1974).

[10] Albert Jan van den Berg, *New York Convention of 1958, Consolidated Commentary, Cases reported in Volumes XXII (1997) - XXVII (2002), in* YEARBOOK COMMERCIAL ARBITRATION 562, 615 (Albert Jan van den Berg ed., 2003) ("There is a general agreement amongst the courts that this language does not leave any discretion to a court for referring the parties to arbitration once the conditions mentioned . . .are fulfilled. The mandatory character of the referral by a court pursuant to Art. II(3) can be deemed an internationally uniform rule. The rule supersedes domestic law which may provide that the court has discretionary power in deciding whether or not to stay a court action brought in violation of an arbitration agreement."); FOUCHARD, GAILLARD,

national courts consistently implement the clear and unambiguous language of the Convention.[11] In this Article, I challenge this common perception by focusing on a salient example of a country that falls short of the expected normative practice. I explore what I call the "emotional disposition" of the Israeli courts, which underscores a gap between the intent of the Convention to standardize judicial behavior and its implementation by national courts.

The Article is divided into four parts. Part II analyzes various approaches taken by the Israeli judiciary in the enforcement of international arbitration agreements under the New York Convention. Part III explores the record of Israeli courts in enforcing international arbitration agreements within the wider context of constructive approaches toward international conventions in general and shows that Israeli courts do not follow any particular constructive approach but rather act upon emotive considerations. Part IV concludes that this tends to discourage international trade and advises Israeli courts to set emotions aside in constructing their approach. The Article stresses the role of national courts in supporting the Convention's regime, and suggests that Israeli courts should follow the treaty objectives in line with other national courts.

II. THE LEGAL CONTEXT: ENFORCEMENT OF INTERNATIONAL ARBITRATION AGREEMENTS IN ISRAEL

The existence of an arbitration agreement does not by itself prevent any party from breaching the agreement and commencing judicial proceedings in court. Israeli law provides a single remedy for a party's breach of agreements to arbitrate: the staying of court proceedings. Therefore, an Israeli court will never declare that it lacks jurisdiction, nor will it grant an injunction for the enforcement of the agreement. Instead, the court will examine the agreement and the underlying circumstances to determine the existence of consent and then either recognize and enforce the arbitration by staying the proceedings in court, or disregard the arbitration agreement and proceed with resolving the dispute.[12]

Israeli law espouses the position that parties cannot oust the jurisdiction

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GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 100, 402–04 (Emmanuel Gaillard & John Savage eds., 1999).

[11] The Yearbook of Commercial Arbitration contains court decisions of signatory countries. YEARBOOK OF COMMERCIAL ARBITRATION (Albert Jan van den Berg, ed.) (published annually 1976–2007).

[12] Pursuant to §§ 5 and 6 of the Arbitration Law, 5728-1968, 22 LSI 210 (1967-1968) Isr. *See infra* note 18.

of the court by their own agreement.[13] This position is rooted in the common law ouster doctrine,[14] which has been approved by Israeli courts in a great number of decisions[15] and conforms to the Israeli approach on the right of access to courts. This right is recognized as a constitutional right and thereby accorded the highest position in the hierarchy of civil rights.[16] In order to uphold this important right, Israeli courts require clear evidence to prove the parties' consent to enter into an arbitration agreement.[17]

Israel incorporated the provisions of the New York Convention on the enforcement of international arbitration agreements through Section 6 of its Arbitration Law. This Section sanctions the court to stay proceedings in favor of arbitration subject to the Convention:

Where an action is brought in court in a dispute which had been agreed to be referred to arbitration, and an international convention to which Israel is a party applies to the arbitration, and such convention lays down provisions for a stay of proceedings, the court shall exercise its power under section 5 in

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[13] *See, e.g.*, CA 201/85 Nitzaney Oz v. Balahsan, [1985] IsrSC 39(3) 136, 139; CA 6796/97 Berg Jacob & Sons (Furniture) Ltd v. Berg East Imports Inc. [2000] IsrSC 54(1) 697, 706.

[14] The "ouster doctrine" was first pronounced in Kill v. Hollister, (1746) 1 Wils. 129, and approved subsequently through case law. *See, e.g.*, Thompson v. Charnock, (1799) 8 Term. Rep. 139, 101 Eng. Rep. 1310; Harris v. Reynolds, (1845) 7 Eng. Rep. (Q.B.) 71; Wood v. The Governor & Co. of Copper Miners in England, (1856) 17 C.B. 561; Scott v. Avery, (1856) 10 Eng. Rep. 1121; Cooke v. Cooke, (1867) L.R. 4 Eq. 77; Edwards v. Aberayron Mut. Ship Ins., (1876) 1 Q.B.D. 563 (Ex. Ch.); Czarnikow v. Roth, Schmidt & Co, [1922] 2 K.B. 478; McKellar & Westerman Ltd. v. Eversfield, [1994] ADRLJ 140; Halifax Fin. Servs. v. Intuitive Sys., [1999] 1 All E.R. 303. In the United States, *see, e.g.*, Am. Sugar Ref. Co. v. The Anaconda, 138 F.2d 765, 766 (5th Cir. 1943), *aff'd*, 322 U.S. 42 (1944); Morales Rivera v. Sea Land of Puerto Rico, Inc., 418 F.2d 725, 726 (1st Cir. 1969); Vimar Seguros Y Reaseguros, S.A. v. M/V SKY REEFER, 29 F.3d 727, 733 (1st Cir. 1994), *aff'd*, 515 U.S. 528 (1995).

[15] *See, e.g.*, CA 433/64 Nevrom Mar. Ltd. v. Hassneh, Israeli Ins. Co. Ltd. [1965] IsrSC 19(2) 159, 165; CA 201/85 Nitzaney Oz v. Balahsan [1985] IsrSC 39(3) 136, 139; CA 102/88 Silver Goose Deli v. Cent. Or S.A.R.L. [1988] IsrSC 42(3) 201, 204; CA 6796/97 Berg Jacob & Sons v. Berg E. Import [2000] IsrSC 54(1) 697, 705.

[16] *See, e.g.*, CA 3833/93 Levin v. Levin [1994] IsrSC 48(2) 862, 874–875; CA 733/95 Arpel Aluminum Ltd. v. Klil Indus. [1997] IsrSC 51(3) 577, 590–591, 628–629; CA 6450/01 Simha Urielli & Sons v. Inst. for Treatment of Ashkelon Sewage [2001] IsrSC 56(5) 769, 773; SHLOMO LEVIN, THE THEORY OF CIVIL PROCEDURE — INTRODUCTION AND BASIC PRINCIPLES 6–7 (1999); YORAM RABIN, ACCESS TO THE COURT AS A CONSTITUTIONAL RIGHT (1998); Shlomo Levin, *Basic Law: Human Dignity and Liberty and Civil Procedure*, 42 HAPRAKLIT 451 (1995-1996).

[17] *See, e.g.*, CA 7608/99 Looky Executing Projects (Bldg.) 1989 Ltd. v. Mitzpe Kinneret 1995 Ltd. [2002] IsrSC 56(5) 156, 163.

accordance with and subject to those provisions.[18]

Section 5 of the Arbitration Law empowers the court to stay proceedings in favor of domestic arbitration under certain conditions.[19] However, by qualifying the exercise of the power to stay "in accordance with and subject to" the provisions of the New York Convention, §6 by its own terms mandates that the Convention supersedes domestic law. Since Article II(3) of the Convention indeed requires courts to refer parties to arbitration, §6 therefore precludes the application of any domestic law that grants courts discretion in a decision to stay proceedings brought in violation of an arbitration agreement.

Despite broad international acceptance of the mandatory referral rule, I show in this Article Israeli courts have not fully recognized it. Although there are instances where a court's rhetoric suggests recognition of this principle—such as the ruling of Supreme Court Justice Shamgar in *Mediterranean Shipping v. Crédit Lyonnais*: [20] "there is a mandatory referral to arbitration, unless the arbitration agreement is null and void, inoperative or incapable of being performed,"—a close analysis of the case law reveals that in fact Israeli courts have failed to follow a uniform discourse on the issue. Hence, it is not possible to construct a single narrative of all legal decisions showing a clear and consistent approach on the matter.

In order to make sense of the diverse judicial opinions, I offer a typology of three different approaches taken by the courts with respect to the mandatory character of referral to arbitration. The first—minority—approach adheres to a strict application of the Convention, and acknowledges the mandatory character of the referral to arbitration.[21] The second approach uses a rhetoric that acknowledges the absence of discretionary power of the court,

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[18] § 6 of the Arbitration Law 5728-1968, 22 LSI 210 (1967–1968). § 5, in turn, provides:

(a) Where an action is brought in court in a dispute which had been agreed to be referred to arbitration, and a party to the action who is a party to the arbitration agreement applies for a stay of proceedings in the action, the court shall stay the proceedings between the parties to the agreement, provided that the applicant has been and still is prepared to do everything required for the institution and continuation of the arbitration.

(b) An application for stay of proceedings may be submitted in the statement of defense or otherwise, but not later than the day on which the applicant first pleads to the substance of the action.

(c) The court may refrain from staying proceedings if it sees a special reason why the dispute should not be dealt with by arbitration.

[19] § 5 of the Arbitration Law.

[20] CA 1407/94 Mediterranean Shipping Co. S.A. v. Crédit Lyonnais (Suisse) [1994] IsrSC 48(5) 122, 126.

[21] *See infra* Part II.A.

but refrains from acting upon it.[22] The third approach explicitly denies that referral to arbitration is mandatory.[23] The typology I offer will clarify the complications that arise in the Israeli courts' particular approaches towards the application of Article II(3) of the Convention.

A. Acknowledging the Mandatory Character of Referral to Arbitration

While one would expect the Israeli courts to acknowledge the mandatory character of referral to arbitration, only a limited number of decisions do so.[24] And even these decisions can be divided into two groups: those that follow a literal application of the rule, and those that leave leeway for the court in its application of Article II(3).

1. The Strict Approach

Very few decisions have adhered to the principle mandating referral to arbitration. In *Mediterranean Shipping*, Justice Cheshin held that the court must stay proceedings, subject to the exceptions specified in Article II(3).[25] A similar approach was taken by the Tel-Aviv District Court in *Midatlantic v. UPS*, where Justice Kling held that the court must stay proceedings once the conditions of Article II(3) are met.[26] He then stressed that the court's application of the Convention should not be subject to domestic doctrines, specifically the doctrine of good faith. Justice Kling explained that "if this is done, the application of the Convention will lead to different results in every state, while the purpose of the New York Convention is to bring homogeneity and certainty."[27]

Some recent decisions of the District and the Magistrates' Courts also implement the language of the Convention literally, holding that courts lack any discretion in the matter.[28] While these decisions achieve the objectives of

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[22] *See infra* Part II.B.

[23] *See infra* Part II.C.

[24] *See infra* Part II.A.1.

[25] Mediterranean Shipping Co., *supra* note 20, at 130–31.

[26] CC (TA) 32914/99 Midatlantic Int'l v. UPS, [1999] (unpublished).

[27] *Id.*

[28] *See* CC (TA) 25977/03 Banco Modular Approaches v. Libert HIROS Italia S.R.L., [2004] (unpublished); CC (TA) 153793/04 Crestar (Overseas) Ltd. v. Iskar Metals & Steel Ltd., [2004] (unpublished); CC (TA) 9028/04 Citrix Systems Inc. v. Sevrilon Ltd. [2005] (unpublished); CC (TA) 192601/04 GE Med. Sys. v. Medtechnique, [2005] (unpublished); CC (TA) 15284/06 B.S.R. Europe Ltd. v. Yosha, [2006] (unpublished); CC (Jer) 1729/05 Can W. Global Commc'ns v. Azur, [2005] (unpublished); CC (Hi) 13048/05 Mond Shipping & Trading v. Dor Shipping & Trading,

the Convention, they are not representative of the Israeli courts' decisions, many of which seem to undermine the goal of respecting the parties' original wish to have their disputes settled by arbitration.[29] This more common view is examined in the following sections.[30]

2. The Broad Approach

Article II(3) of the Convention sets out three exceptions to mandatory referral: the arbitration agreement is null and void, inoperative, or incapable of being performed. While the exceptions were not subject to discussion or explanation during the preparation of the Convention, the courts of contracting states tend to apply them literally.[31] Although a strict application of these exceptions would further the objectives of the Convention in facilitating the enforcement of arbitration agreements, Israeli courts have frequently failed to do so.

An example of the adoption of a broad approach to the application of the exceptions is the decision of the Tel-Aviv District Court in *University of Leicester v. Cohen*.[32] In this case, the court held that the third exception in the Article, namely that the arbitration agreement is incapable of being performed, includes the risk of multiple proceedings in court and arbitration. This exception usually encompasses the cases where the arbitration cannot proceed. For example, when the arbitration is not possible at the agreed seat of arbitration or when the arbitrator appointed in the arbitration agreement cannot or does not wish to act.[33] The exception does not in any way include the exception of multiplicity of proceedings. By broadening the limits of the third exception, the court endowed itself with discretionary power to refuse to stay proceedings where not all parties to the court proceedings are parties

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[2005] (unpublished).

[29] *See infra* analysis of cases Parts II.A.2, II.B, and II.C.

[30] *See infra* Part II.A.2

[31] *See, e.g.*, Scherk v. Alberto-Culver Co., *supra* note 8, at 515–19 (1974); Ledee v. Ceramiche Ragno, *supra* note 9, at 187 (1st Cir. 1982) ("An expansive interpretation of the [null and void] clause would be antiethical to the goals of the Convention."); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 659 (1985) ("The former qualification principally applies to matters of fraud, mistake, and duress in the inducement, or problems of procedural fairness and feasibility."); Dimercurio v. Sphere Drake, Ins. Plc., *supra* note 9, at 80 (1st Cir. 2000) ("[T]he ["null and void"] clause must be interpreted to encompass only those situations—such as fraud, mistake, duress, and waiver—that can be applied neutrally on an international scale.").

[32] CA (TA) 3060/03 Univ. of Leicester v. Cohen, [2004] (unpublished).

[33] JULIAN D.M. LEW ET. AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 344 (2003).

to the arbitration agreement. However, Article II(3) of the Convention grants no such discretion to the national courts. There is no question that this approach runs counter to the goal of predictability and the promotion of confidence in the arbitration process by the international business community.

B. Acknowledging Rhetorically the Mandatory Character of Referral to Arbitration but Avoiding to Act upon it

The majority of Israeli courts' decisions recognize the mandatory character of referral to arbitration at the outset, but ignore it at the implementation stage and proceed to subject Article II(3) to additional conditions or exceptions, all derived from Israel's domestic Arbitration Law.[34]

1. Adding Exceptions to Article II(3)

Article II(3) of the Convention provides an exhaustive list of exceptions to the mandatory rule of referral to arbitration: where the arbitration agreement is null and void, inoperative, or incapable of being performed. By contrast, the law of domestic arbitration agreements in Israel bestows on the court discretionary power to refuse to stay proceedings if it finds a "special reason that the matter should not be decided in arbitration."[35]

"Special reason" is a broad term, whose more precise confines have been shaped by judicial interpretation. Although a complete analysis of decisions on this matter is beyond the scope of this Article, a brief examination shows that the Israeli courts' decisions have focused on three categories of special reasons: the first relates to the arbitration agreement, the second concerns procedural efficiency, and the third embodies reasons of judicial policy.

The category focusing on the arbitration agreement itself includes cases in which courts have justified their refusal to stay proceedings on the ground of impossibility of enforcement. For example, where the agreement is not

[34] Enforcement of domestic arbitration agreements is subject to § 5 of the Arbitration Law. *See supra* note 18.

[35] Part II.B of this Article deals with the catch-all discretionary power grant of § 5(c), which has been used indirectly by Israeli courts to overlook the clear language of § 6, while at least acknowledging in rhetoric the principle of mandatory referral derived from § 6. By contrast, courts which had imported discretion to examine a party's "preparedness" of § 5(a) into decisions on international arbitration agreements governed by § 6 have generally explicitly denied the mandatory nature of referral and thus more properly belong to Part II.C of this Article. For a detailed discussion of the preparedness condition of § 5(a), see *infra* Part II.C.

clear[36] or where the arbitrator specified in the arbitration agreement is identified with one of the parties to the arbitration.[37]

The category of "special reasons" concerned with procedural efficiency involves cases where enforcing the arbitration agreement would obstruct the purpose of settling the dispute quickly and efficiently. One such reason is the imminent delay in the arbitral proceedings. If the delay is caused by the party applying for the stay, the party's application will be denied.[38] Another cited reason is the avoidance of multiple proceedings in the arbitral and judicial forums.[39] Thus, where some parties to the court proceedings are not parties to the arbitration agreement, the court may deny the application for stay. The same result is likely where some relief claimed in court lies outside the jurisdiction of the arbitrator as defined in the agreement.

The category of "special reasons" involving judicial policy includes reasons directly related to the legal system. Thus, a court may exercise its discretion to deny the application for stay when it believes that the matter should be decided according to substantive law (and not independently of it),[40] or when the dispute concerns a matter of public importance.[41]

In some instances the Israeli courts have examined whether the multiple proceedings exception applies to applications for stay of proceedings with regards to an international arbitration agreement. Rather than broadly interpreting and applying Article II(3) exceptions, as in *University of Leicester*,[42] some courts have added the risk of multiple proceedings as a

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[36] *See, e.g.*, CA 35/49 Nussboim v. Steiner [1951] IsrSC 5 37; CA 270/75 Remed Ltd. v. Weschester Ltd. [1975] IsrSC 29(2) 813.

[37] *See, e.g.*, CA 434/86 Good Memory Soc'y v. Old People's Rest Home Soc'y [1988] IsrSC 42(2) 827; CA (Hi) 650/96 Dori Co. v. Ben Harosh [1996] (unpublished).

[38] *See, e.g.*, CA 327/56 Ramat-Gan Muni. v. Katzenstein [1957] IsrSC 11 434; CC (Nz) 26/79 Kadima Ins. Office Ltd. v. Abed Elaziz, [1980] IsrDC 5740(2) 485; CC (TA) 1733/93 Lifshir Ltd. v. Agudat Yisrael Ass'n, [1994] IsrDC 5754(1) 212; CA 308/85 Shitrit v. Kfar Shmuel [1986] IsrSC 41(1) 742; CA 1212/97 Shelev v. Rotenberg [1997] (unpublished).

[39] *See, e.g.*, CA 95/58 Veinblum v. Zedar [1958] IsrSC 12 1514; CA 20/70 Amir v. M.Z.K. [1970] IsrSC 25(1) 692; CA 4/71 Dominion Ins. Co. v. Greek S. Am. Line Shipping [1971] IsrSC 25(1) 757; CA 169/80 Jacob Ori Ltd. v. Kaneti [1981] IsrSC 35(2) 837; CA 985/93 Elerina Inv. v. Berki [1993] IsrSC 48(1) 397; CA 5820/98 Ressido Si Ltd. v. Samson Digging & Constr. [1998] IsrSC 52(4) 796; CC (Jer) 4225/99 City Gates v. Denya Sibus [2000] (unpublished).

[40] *See, e.g.*, CC (TA) 2796/89 Tnuva Ltd. v. Ziv [1991] IsrDC 5751(2) 353; CA 563/90 Petah-Tikwa Workers' Comm. v. Shimshon [1991] IsrSC 45(5) 589.

[41] *See, e.g.*, CC (Hi) 35/87 Estate of Oppenhemier v. Hahariya, [1991] (unpublished); CC (Af) 197/95 Kibbutz Sdeh Nachum Coop. Soc'y v. Kendral, [1995].

[42] CA (TA) 3060/03 Univ. of Leicester, *supra* note 32.

new item to the closed list of exceptions to mandatory referral..[43]For example, in *Zisser v. Neot Oasis*[44] the Tel-Aviv District Court allegedly acknowledged the mandatory character of the referral to arbitration, but not before it examined the applicability of an exception of multiple proceedings to the case.[45] This examination led the court to conclude that the risk of multiple proceedings could not be substantiated. Consequently, the court upheld the agreement out of respect for the parties' autonomy.[46] Yet, at no point did the court recognize that it lacks discretionary power in the matter.

In another instance, the Supreme Court declared in *Hotels.com v. Zuz Tourism*[47] that the need for legal certainty in the application of the Convention calls for a literal application of the Convention and its exceptions. Yet, after such clear rhetoric, the Court nevertheless chose to carve out a caveat, which calls into question the sincerity of its declaration. Justice Gronis, who gave the opinion for the court, held that he is "ready to assume that there are likely exceptional cases where the court may be allowed to refrain from staying proceedings, even if none of the said exceptions applies, although these cases will be rare."[48] In other words, the court acknowledged that the list of exceptions may, in exceptional cases, not be exhaustive.

A recent decision held that one such exceptional case is where the court assumes that there is a "general public interest" that the dispute be decided in court and not in arbitration. [49] In other words, when the court thinks that the matter is of public importance, it may decide to disparage the plain wording of the Convention and deny the application for stay of proceedings.

These cases show a clear tendency of the court to depart from the literal application of the Article by adding to it further exceptions. It is remarkable that the courts added these exceptions without even discussing the appropriateness of such action. In other words, the courts did not even consider the fact that the list of exceptions is exhaustive.[50] In any case,

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[43] *See, e.g.*, CC (Hi) 13048/05 Mond Shipping; CC (TA) 17444/04 Hach Co. Inc. v. Tambur Ecology Ltd. [2006] (unpublished).

[44] CC (TA) 1856/00 Zisser v. Neot Oasis, [2001] (unpublished).

[45] *Id.*

[46] *Id.*

[47] CA 4716/04 Hotels.com v. Zuz Tourism Ltd., [2005] (unpublished).

[48] *Id.* In this light, *see also* CC (TA) 155004/08 OBO Bettermann GmbH & Co. KG v. M.D.A. Import & Mktg. Ltd. [2008] (unpublished).

[49] CC (TA) 10870/07 Teva Pharm. Indus. v. Proeuron Biotech. Inc., [2007] (unpublished).

[50] In this respect it is worth noting that in *Mediterranean Shipping* the Supreme Court Justice Strassberg-Cohen left unanswered the question whether the Article provides

whether the result of forethought or lack thereof, the addition of exceptions undoubtedly opens the door for wide discretionary power to the courts and, as a direct consequence, lack of certainty for the international business community.

2. Subjecting the Application for Stay to the Domestic Doctrine of Good Faith

As outlined above, the international regime intended by an international convention is best maintained when the national courts read treaty provisions according to their plain language and context and refrain from applying domestic standards in the implementation of the Convention. Contrary to this basic principle, one approach adopted by Israeli courts in implementing Article II(3) of the Convention has been to subject the implementation to the domestic doctrine of good faith.

In Israeli law, the doctrine of good faith is embodied in the Contracts (General Part) Law, 1973.[51] It applies to negotiating contracts,[52] to fulfilling obligations or rights arising out of contracts,[53] as well as to legal acts and obligations not arising out of a contract.[54] It applies in substantive law as well as in procedural law. Justice Barak of the Supreme Court explained its application to procedural law in *Shilo v. Razkabski*:

This duty of a party to use its legal-procedural powers in an appropriate manner and in good faith, lays upon him the duty to behave in a way that an honest and reasonable party would act. The examination of the behavior is neither subjective nor dependent on the individual approach of the party as to what is right and appropriate. The appropriate test takes into account the special circumstances of the case and places them in the melting pot of fair and reasonable behaviors. In this context one should require that the parties not be wolves to each other, although one should not insist that they be angels to one another. It should be stressed that they should behave to each other as fair and reasonable people.[55]

While the doctrine of good faith applies throughout the entire legal system, a question arises as to the desirability of its application to an arbitration agreement governed by the New York Convention.[56] This

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an exhaustive list of exceptions. Mediterranean Shipping Co., *supra* note 20, at 127.

[51] The Contracts (General Part) Law, 1973, 27 LSI 117.

[52] *Id.* § 12.

[53] *Id.* § 39.

[54] *Id.* § 61.

[55] CA 305/80 Shilo v. Razkabski [1981] IsrSC 35(3) 449, 461–62.

[56] *See* Daphna Kapeliuk, *Enforcement of Foreign Arbitration Agreements; The*

question was discussed both by the Tel-Aviv District Court and on appeal by the Supreme Court in *Mediterranean Shipping*,[57] as well as by the Tel-Aviv District Court in *Midatlantic v. UPS*.[58]

Justice Kling of the Tel-Aviv District Court ruling on the matter in *Mediterranean Shipping*, recognized the duty to refer the parties to arbitration according to Article II(3) of the Convention, but added that the applicant for a stay has to act in good faith. In this case the defendant contended in arbitration that he was not a party to the arbitration clause and at the same time applied for a stay of proceedings in court. Justice Kling, who rejected the application for stay, held that this behavior is "tainted with bad faith."[59] On appeal, Justice Shamgar followed Justice Kling's ruling and held:

Whoever applies for a stay of proceedings in order to conduct arbitration must aspire in good faith that the dispute that would have been heard in court be heard in arbitration. An application, the purpose of which is to prevent any proceedings, in any place — that is, neither in court nor in arbitration — constitutes the use of a legal provision for other than its intended purpose.[60]

The application of the good faith doctrine, so deeply enshrined in Israeli law, to an application for stay of proceedings pursuant to the New York Convention, was followed in *IDG v. Danzig*[61] by the Jerusalem District Court, which held that the burden of proof rests on the applicant for stay to show that he aspires in good faith to hold the arbitration.

It is clear that the application of the good faith doctrine, which is not part of the New York Convention regime, is contrary to the uniformity principle of the Convention and thus hurts the certainty of its implementation. In fact, five years after rendering his opinion in *Mediterranean Shipping*, Justice Kling of the Tel-Aviv District Court objected to the application of the good faith doctrine in *Midatlantic*. Inconsistent with his previous ruling, he refused to add any conditions to Article II(3) of the Convention or to subject the Article to domestic principles, including the venerable domestic principle of good faith. Justice Kling wrote:

Israeli Experience, 17 J. INT'L ARB. 109 (Oct. 2000).

[57] CC (TA) 477/93 Mediterranean Shipping Co. v. Crédit Lyonnais (Suisse), [1994] (unpublished). *See also* CC (TA) 17047/94 Swissa v. Arieli, [1995] (unpublished).

[58] Midatlantic Int'l., *supra* note 26.

[59] Mediterranean Shipping Co., *supra* note 20.

[60] *Id.* at 127.

[61] CC (Jer) 3184/98 IDG – Int'l Dev. Group N.V. v. Danzig Sec., [1998] (unpublished); *see also* CA 8024/06 Dolphin Mar. v. Cruise World Disenhaus Ltd. [2007] (unpublished).

> It is impossible to subject the application of the Convention to the good faith principle as it is in Israeli law, when this principle is not accepted in all contracting states. If this is done the application of the Convention will lead to different results in every state, when the purpose of the New York Convention is to bring homogeneity and certainty.[62]

Whether Justice Kling's change of heart is to be taken at face value or not, in either scenario, it highlights the unpredictable nature of outcomes for potential litigants when national courts fail to strictly uphold international regimes ratified by their states.

C. Denying the Mandatory Character of Referral to Arbitration

While the decisions discussed above acknowledge the mandatory character of the referral to arbitration, if only in rhetoric, some Israeli courts explicitly deny this mandatory character.

The Haifa District Court decision in *Thyssen Aufzuge v. G.Y. Rom Entrepreneurs*[63] provides one of the most striking examples of this quandary. The court held that it "has perpetual discretion, forever, whether or not to order a stay of proceedings due to an arbitration agreement, and this applies if the arbitration is subject to § 5 of the Law or to § 6 of the Law." Acknowledging that none of the exceptions specified in Article II(3) applied to the case, the court required that the applicant for stay "present before the court an evidential basis that he is ready to pursue arbitration proceedings."[64] The court justified this requirement by the concern that an applicant might apply for a stay without truly wishing to have the dispute decided in arbitration.

Not only did the Haifa District Court endow itself with unlimited discretionary power, it effectively imposed the Arbitration Law's §5 requirement of readiness onto a case clearly governed by §6 and the Convention, confounding the separate legal regimes provided by the legislature. As explained above, §5 provides the court with wide discretionary power, which includes the power to examine a party's intentions behind the application for a stay. Section 5(a) puts the burden on the applicant to prove that they are ready and willing to have the dispute decided by an arbitrator and that the applicant's intention is not to postpone

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[62] Midatlantic Int'l. *supra* note 26.

[63] CC (Hi) 26972/97 Thyssen Aufzuge GmbH v. G.Y. Rom Entrepreneurs [2001] (unpublished) ; *see also* Zisser, *supra* note 44.

[64] *See* Thyssen Aufzuge GmbH, *supra* note 63. *See also* CC (TA) 164704/08 S.F. Wing Real Estates Inv. Ltd. v. Gibor B.S.R. Europe B.V. [2008] (unpublished).

the resolution of a dispute.[65]

On the same ground, the Tel-Aviv District Court refused to accept that it lacks discretionary power in the application of Article II(3) in *General Electric v. Migdal Insurance*. Indeed, the court held that denying it the possibility to examine the applicant's readiness to pursue arbitration "has especially severe implications."[66] The insertion of the readiness condition to the application for stay pursuant to Article II(3) demonstrates the court's clear tendency to appropriate discretionary power, where such power has been explicitly denied by the Convention. An examination of an applicant's readiness — and the intentions behind an applicant's exercise of right — to pursue arbitration opens the door for unbridled use of discretionary power by the court because an applicant's behavior can be interpreted in various ways. There can be no doubt that such examination is contrary to the goal and purpose of the Convention to impose certainty and predictability expected in its implementation.

Zuz Tourism v. Hotels Online[67] is another example of a case where the Jerusalem District Court denied the mandatory character of the referral to arbitration. Although this decision was reversed on appeal by the Supreme Court,[68] its examination is necessary in order to better understand many Israeli courts' approach to this matter.[69] In this particular case, a plaintiff bound by an international arbitration agreement sued two defendants, one of whom was not party to the agreement. A defendant who was bound by the arbitration agreement applied for a stay of proceedings pursuant to the Convention. The district court denied the application for stay on the ground that the risk of multiplicity of proceedings in court and in arbitration took precedence over any obligation imposed on the court by the Convention. Justice Drori held:

> I am aware that there is apparently contradictory case law before us: on the one hand the court lacks discretion with respect to an arbitration agreement to which the New York Convention applies and it must refer the matter to arbitration in accordance with Section 6 of the Arbitration Law; on the other hand, when a claimant files a suit against two defendants, and the claimant is bound by an arbitration agreement with only one of the

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[65] *See, e.g.*, CA 254/88 Kibbutz Kadarim v. Morad [1982] IsrSC 42(3) 74; CA 286/83 Kemer v. Robinson-Lipsky [1983] IsrSC 37(4) 245.

[66] CC (TA) 842/87 GE Corp. v. Migdal Ins. Co., [1991] (unpublished).

[67] CC (Jer) 1929/02 Zuz Tourism Ltd. v. Hotels Online Ltd., [2004] (unpublished).

[68] CA 4716/04 Zuz Tourism Ltd.. The Supreme Court ruling was further followed in CC (TA) 16748/05 Electra Ltd. v. Turbo Eng'g & Mktg. Ltd. [2006] (unpublished).

[69] *See also* CA (TA) 1144/05 Lake Marion Golf Estates Ltd. v. Perwer [2005] (unpublished); CC (TA) 1987/02 Daewoo Motor Co. v. Telcar Ltd. [2006] (unpublished).

> parties, the court has discretion whether to refer the proceedings to arbitration or not.
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> In my opinion, the discretion granted to the court should be preferred in a case of a claim against two parties. It is therefore appropriate that the use of discretion would instruct us to leave the case before the court.[70]

This decision to deliberately dismiss the mandatory referral of Article II(3) of the Convention was reversed by the Supreme Court, which held that Article II(3) of the Convention "holds in mandatory language that the court shall refer the parties to arbitration unless one of the three exceptions applies."[71] Note, however, that although the Israeli District Courts' use of the risk of multiplicity of proceedings to deny a stay was rejected by the Supreme Court, the Supreme Court stated that there may be exceptional cases that go beyond those specified in Article II(3) that may justify refusal to stay proceedings. Therefore, one might argue that the Supreme Court's conclusion in *Zuz* is merely another example of the rhetoric examined above.[72] In fact, in the very same case, the Supreme Court managed to carve out a caveat for "exceptional cases where the court may be allowed to refrain from staying proceedings, even if none of the [Article II(3)] exceptions apply. . . ."[73]

Despite the Supreme Court's admonition that such cases would be rare, this Article's close examination of Israeli courts' record on enforcement of international arbitration agreements highlights the fact that the opposite is actually true. Cases which apply the Convention in accordance with the plain reading of the text and the clear intentions of its drafters are an exception rather than the rule.[74] There can be no doubt that this practice hurts the treaty regime that the Convention purports to establish and stands clearly contrary to the goal of predictability and confidence in the arbitration process by the international business community.

D. Enforcement of International Arbitration Agreements : An Interim Assessment

The typology offered above shows that one cannot establish a single narrative for the Israeli courts on the issue under examination. The cases

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[70] Zuz Tourism Ltd., *supra* note 67.

[71] Zuz Tourism Ltd., *supra* note 68.

[72] *Supra* Part II.B.1.

[73] Zuz Tourism Ltd. *supra* note 68; *see supra* Part II.B.1..

[74] *Supra* Part II.A.1.

discussed exhibit a pattern of decisionmaking by the courts that is both unclear and inconsistent. While one expects the courts to take a clear stand on the matter and to follow a uniform approach denying discretionary power and mandating referral to arbitration once the conditions of Article II(3) are met, only a scant number of decisions follow this approach. The majority of decisions follow different paths that fall short of the common and homogenous application expected from all contracting states. These paths exhibit the Israeli courts' tendency to assume discretionary power, be it by subjecting the application of Article II(3) of the Convention to further conditions derived from domestic principles, or by adding exceptions to those specified in the Article, or by explicitly appropriating discretionary power. Thus, although the courts have in various occasions expressed an acknowledgment of the mandatory character of referral to arbitration, this awareness has, in most cases, not translated into decisions consistent with this principle. Therefore, it could be said that in many instances the courts prefer to forget that they operate within the context of an international treaty system where they are expected to implement the international regime in a way that furthers its objectives rather than hinders them.

III. THE WIDER CONTEXT: ON INTERPRETATION AND EMOTIVE DISPOSITIONS

The Israeli courts' failure to apply Article II(3) of the Convention in the manner expected from all courts in contracting states raises several questions. What is the court's rationale for denying, in most cases, the absence of discretionary power in enforcing an arbitration agreement pursuant to the Convention? Have the courts followed a specific interpretative approach, which led them to ignore the mandatory character of referral to arbitration? In order to answer these questions, a brief survey of different interpretative approaches of international conventions adopted by Israeli courts follows.

A. Two Methods of Interpretation: The General Framework

The term "*legal interpretation*" has different meanings.[75] It was defined by Justice Barak of the Supreme Court as "a rational activity that gives a legal text meaning."[76] By interpreting a legal text the court extracts the legal

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[75] WILLIAM L. TWINING & DAVID MIERS, HOW TO DO THINGS WITH RULES: A PRIMER OF INTERPRETATION 166 (4th ed. 1999); ANNETTE BARNES, ON INTERPRETATION: A CRITICAL ANALYSIS 7 (1988).

[76] AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW 18 (Sari Bashi, trans., 2003) (in Hebrew); *See also* RUPERT CROSS, STATUTORY INTERPRETATION (John Bell & George Engle eds., 3rd ed. 1995); HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL

meaning of the text from its linguistic meaning.[77] When a legal text is clear, there is no need to interpret it. It can be implemented through a simple, literal textual application. Interpretation is needed when a text lacks clarity or is ambiguous, or when it has more than one possible meaning.

Israeli courts follow two basic methods of construing international conventions. Each method reflects a different attitude towards the place of the legal text within the legal system and of the role of the court as the interpreter of the text.

The first method, which can be termed "subjective," centers on the psychological-historical intention of the drafters of the convention.[78] Using this method, the interpreter tracks backwards the path taken by the drafters: the drafters begin with a purpose and end with the text, whereas the interpreter begins with the text and ends with its purpose. Since the interpreter strives to give the text the same legal meaning that it had when it was created, he looks for the values, aims, interests, policy and purpose that the drafters sought to fulfill. This method emphasizes the need to assure, as much as possible, an appropriate and homogenous application of the convention.

Accordingly, the interpreter using the subjective method does not resort to national law in interpreting the convention, unless the convention refers to it expressly or leaves a specific question unanswered. Justice Levin of the Supreme Court explained this interpretative method in these words: "In the art of construction, . . . [o]ne has to avoid correcting th[e] legislative text by preferring a specific result over the result intended by its drafters under the pretext of construction."[79]

The second method, which can be labeled "objective," focuses on the actual text of the convention and emphasizes its literal meaning. The interpreter construes the text irrespective of the drafters' purpose. Behind this interpretative method lies the idea that once a convention is drafted it becomes detached from its drafters and exists independently of them. The purpose of the drafters is therefore irrelevant to the interpretation of the text.[80] Thus, the interpreter construes the legal text according to his own

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PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1374 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); Michael S. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151 (1981).

[77] Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 64 (2002).

[78] BARAK, *supra* note 76, at 71.

[79] CA 36/84 Teichner v. Air France [1987] IsrSC 41(1) 589, 625.

[80] T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988); Lord Steyn, *Interpretation: Legal Texts and Their Landscape*, *in* THE COMING TOGETHER OF THE COMMON LAW AND THE CIVIL LAW, 79-81 (Basil Markesinis ed.,

national legal philosophy.[81] Norms of international character are thereby examined through national eyes. This interpretative method was described by Justice Cohn of the Supreme Court with respect to legal texts in general in these picturesque words:

> Once enacted, the law is disconnected from the legislative process and begins an independent life, as a self-supporting living entity that needs interpretation and implementation according to its own context and language. Once enacted, the persons who were in charge of preparing it and who voted for it become *functi officia*—their work has ended and their traces will only be historical. This is an allegory to a baby, who, once is born becomes a human being of his own, who lives a life of his own. The fact that the baby and the law may bear with them genetic diseases, the baby—in his physical appearance, and the law—in its linguistic style, does not lessen their disconnection from their makers: the baby from his mother and the law from the legislator. Moreover, as there is no relevance between the baby's physical appearance and what his mother thought and said during her pregnancy, there is no relevance to the law in what was the material for its preparation. A mother's wish that her child would be brighter and better looking than she is also fulfilled by the legislator: there is no law that is neither smarter nor wiser than its legislator.[82]

B. The Emotive Disposition of Israeli Courts

Can the courts' inconsistent rulings on the application of Article II(3) of the Convention be explained by any one of the constructive approaches towards international conventions discussed above? Can the appropriation of discretionary power be deduced from the adoption of any method of interpretation which allows the court to depart from a strict, literal application of the language of the Convention?

At first glance, it can be suggested that the courts' rulings seem to conform to the objective method of interpretation rather than to the subjective method, as the court has relied in some instances on its national legal rules and doctrines in the application of the Convention. They did so, for example, when they subjected the application of Article II(3) to the domestic condition of readiness to pursue the arbitration and to the domestic doctrine of good faith, as well as when they added the domestic exception of multiplicity of proceedings to the list of exceptions specified in the Article.

2000).

[81] Teichner, *supra* note 79 at 613.

[82] Haim Cohn, *Preparation Material*, *in* IN MEMORIAM URI YADIN 79, 98 (Aharon Barak & Tana Spanic eds., 1990).

In these cases, the courts approached Article II(3) of the Convention through national domestic spectacles, which grant it wide discretionary power to refuse to stay proceedings. It could therefore be suggested that the courts followed the objective approach, according to which an international convention incorporated into the national legal system does not stand alone. The Convention is integrated into the legislative system in order to achieve legislative harmony, and thereby forms a part of the internal legal system.[83] This harmony is of a domestic character, and as such, its objectives may be different from the objectives relevant to international conventions, such as cross-border uniformity and certainty in their application.

However, using the objective method of interpretation to explain and exonerate the courts' failure to apply the New York Convention literally requires an assumption that the literal text of the New York Convention as adopted through § 6 of Israel's Arbitration Law actually requires any interpretation. This is simply not the case. As explained above, § 6 clearly instructs the courts to stay proceedings and refer cases to arbitration under the provisions of the Convention. The Convention itself, through Article II(3), clearly provides a short and exhaustive list of exceptions to the mandatory referral rule, none of which by their own terms permit the courts to exercise discretion or to adopt principles of domestic law to the referral dispute.

Indeed, it seems that the courts did not deem it necessary to resort to any method of interpretation, as they agreed that the language of Article II(3) of the Convention is clear. In the majority of cases discussed above, the courts declared that the Convention mandates them to refer the parties to arbitration, thereby affirming the unequivocal language of the text. The courts did not think that they had to interpret the text. Furthermore, it is important to note that not a single decision refers, either directly or indirectly, to any constructive method of interpretation. The courts themselves have not espoused the use of any specific interpretive method when they appropriated discretionary power. Therefore, to attempt an evaluation of the courts' rulings through interpretative approaches would require a resort to a speculative and unsubstantiated assumption, which ignores both the nature of the law and the courts' own rhetoric.

What was therefore the rationale behind the courts' appropriation of discretionary power? What was the reason that led these courts to depart from a strict application of Article II(3) mandating them to refer the parties to arbitration? My contention is that the courts' attitude stems from an emotive

[83] HCJ 693/91 Efrat v. Dir. of Population Registry in the Ministry of Interior [1993] IsrSC 47(1) 749, 765 (a legislative act does not stand alone, but forms part of the legislative system).

disposition toward the denial of its discretionary power.

Discretionary power means the power to choose between different options, when each option is viable within the framework of the law.[84] Where there is no choice, there can be no discretion. Thus, when the language of a legal text mandates the court to act in a certain way, the court has no choice and has to act accordingly. Indeed, many courts recognized in principle that they had no choice but to refer the parties to arbitration, yet refrained from doing so.[85]

Israeli courts clearly feel uncomfortable with the denial of their discretionary power. Therefore, although the rhetoric acknowledged the absence of discretion, the courts' emotive disposition made it nearly impossible for them to act accordingly. As these courts are accustomed to employing wide discretionary power within the judicial process,[86] any provision that denies this power is regarded with caution and unease. The Supreme Court has upheld a presumption that legislative texts are not intended to deny it its judicial power. [87] It added that unless the text expressly states the contrary, it may not limit the discretion of the court.[88] Mandatory referral to arbitration provided in Article II(3) does not seem to adhere to this presumption and to the court's perception of its role in the judicial system.

My contention is supported by the words of Justice Strassberg-Cohen of the Supreme Court in *Mediterranean Shipping*, holding that "depriving the court of its discretionary power, which is at the very heart of the art of judging, causes some discomfort,"[89] and by the decision of the Haifa District Court in *Thyssen* declaring that it has "perpetual discretion."[90] Therefore, while the courts are aware of the absence of discretionary power, this awareness does not translate into decisions applying the Convention strictly, simply because the courts choose not to do so.

We can therefore conclude that Israeli courts did not resort to any

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[84] See, e.g., BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 59 (1924); HART & SACKS, *supra* note 76, at 162 ("Discretion means the power to choose between two or more courses of action, each of which is thought of as permissible."); Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 636 (1971) ("If the word discretion conveys to legal minds any solid core of meaning, one central idea above all others, it is the idea of *choice*.").

[85] *See supra* Part II.B.

[86] On judicial discretion, *see generally* AHARON BARAK, JUDICIAL DISCRETION (1987) (in Hebrew).

[87] AHARON BARAK, INTERPRETATION IN LAW; STATUTORY INTERPRETATION, 530–37 (1993).

[88] *Id.*

[89] Mediterranean Shipping Co., *supra* note 20, at 127.

[90] Thyssen Aufzuge GmbH, *supra* note 63.

method of interpretation when applying Article II(3) of the Convention. They tend to disregard the mandatory character of referral to arbitration, because they choose to do so out of their own emotive disposition. Deviation from a strict application of the Convention appears legitimate to these courts due to the difficulty they have in accepting the denial of their everyday discretionary power. Do the courts think of the greater implications of this behavior as discussed above? Apparently not.

IV. CONCLUSIONS

The Israeli courts do not seem to fully make peace with the denial of discretionary power by Article II(3) of the New York Convention. The cases discussed above show that the courts failed to demonstrate a coherent approach to their role in enforcing international arbitration agreements. The analysis undertaken in this article rejects the notion that interpretation is the reason for the court's approach. It contends that the emotive disposition of the courts toward provisions that limit their discretionary power is at the heart of the deviation from the rule mandating them to refer the parties to arbitration. That is to say, the courts assumed discretionary power because they felt this was the right thing to do.

There is no doubt that the courts' approach on the matter undermines the purpose of the Convention to shape broad-based behavior of courts in contracting states, leading to predictability and confidence in international arbitration for the business community engaged in cross-border commerce. The achievement of this purpose requires the courts to act according to a threshold level of homogeneity in the application of the Convention and to refrain from resorting to domestic doctrines and principles.

Israeli courts have yet to develop consistent case law, in order to endeavor to conform to the objectives of the Convention and to ascertain that its implementation of the Convention does not differ from the implementation of other courts of contracting states. One hopes that when emotions are put aside the courts will be in a better position to make informed decisions that conform to the uniform application of the Convention.